Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	

REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA IN THE FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING AND THIRD NOTICE OF INQUIRY

To The Commission:

The Alliance for Community Media respectfully submits these reply comments in the above-captioned proceeding. The Alliance again urges the Commission to endorse proposals to require market-rate compensation for broadcasters' use of spectrum, and to allocate revenue and capacity from advanced television ("ATV") spectrum assignments for uses which the Commission has found to be in the public interest.[1]

I. COMPENSATION FOR BROADCASTERS' USE OF SPECTRUM SHOULD BE BASED ON THE FAIR MARKET VALUE OF THE ASSET.

The Alliance notes that the broadcasters do not oppose in principle the payment of fees for ancillary and supplementary services provided on a subscription basis (hereafter, "A&S"),[2]

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[1] See, e.g. 47 U.S.C. Sec. 303(b), 47 C.F.R. Sec. 73.671 (children's programming); 47 C.F.R. Sec. 73.3526(a)(8), (9)(community-related programming); 47 U.S.C. Secs. 312(a)(7), 315; 47 C.F.R. Secs. 73.1944, 73.1941 (political communications).

[2] Broadcasters' Comments at 23.

as provided for in pending House[3] and Senate[4] telecommunications legislation. Moreover, the Alliance welcomes the broadcasters' willingness to pay fees "comparable" to what competitors in similar services pay for similar spectrum use.[5] Needless to say, the devil is in the details. The Alliance hopes that the Commission will implement a fee structure that accurately reflects the market value of the spectrum allocation. We also continue to maintain that these fees should not -- and cannot -- replace regulation requiring ATV licensees broadcasting multiple digital signals to provide access for public, educational and governmental purposes -- or at least provide financial support for such access.[6]

Auctioning the spectrum pursuant to Section 309(j) of the Communications Act is the most efficient way to determine the spectrum's fair market value.[7] Auctions are permissible under this section because applicants seek mutually exclusive licenses for new,[8] principally subscription,[9] services.

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[3]H.R. 1555, Sec. 336(d), 104th Cong., 1st Sess. (1995).

[4]S. 652, Sec. 206(a)(2), 104th Cong., 1st Sess. (1995).

[5]Broadcasters' Comments at 23.

[6]Such an access requirement could be waived if a licensee broadcasted high-definition television ("HDTV") exclusively, without any other A&S services.

[7]See, e.g., L. Friedman, Microeconomic Policy Analysis at 582-583 (1984)(competitive bidding enables seller to find equilibrium price, and prevents monopolistic exploitation of public resource).

[8]47 U.S.C. Sec. 309(j); Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). (hearings or auctions required when awarding mutually exclusive licenses for new services). See also Broadcasters' Comments at 18, and Alliance discussion at Section III, infra.

The broadcasters misread Section 309(j)(7)(A) in an attempt to convince the Commission that an auction is impermissible if the Commission notices that revenue may potentially accrue from its use.[10] This reading is incorrect on its face. The subsection cited by the broadcasters states:

> (A) CONSIDERATION PROHIBITED. -- In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph 4(C) of this subsection, the Commission may not base a finding of public interest, convenience and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.[11] (Emphasis added).

The intent of this subsection is to ensure that the Commission does not decide to allocate spectrum merely to raise revenue; there must be an independent, non-revenue reason to make spectrum available. The provision's legislative history, like the statute itself, does not support the broadcasters' position; it states that the decision to allocate spectrum should not be revenue-based.[12] To the contrary, Section 309(j)(3)(C) of the Communications Act commands the Commission to consider potential federal revenue when making an auction decision.[13] We therefore

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[9]See Comments of Media Access Project, et al. ("MAP Comments") at 6, 16 (pending telecommunication legislation indicates that most of spectrum will be used for subscription services).

[10]Broadcasters' Comments at 30.

[11]47 U.S.C. Sec. 309(j)(7)(A).

[12]See Broadcasters' Comment at 30 n.33.

[13]In its relevant portion, the subsection states:

> (3) ... in designing methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum

urge the Commission comply with Section 309(j)(3)(C) and authorize sensible, effective auction procedures.

In the absence of a true auction, the Commission can impose fees comparable to auction results, or determine the value of licenses by basing them on current license transfer prices. In any case, there are minimal procedural difficulties in implementing auction or auction-equivalent fees. Fees could be imposed, for instance, by employing a formula reflecting the average "per-viewer" fair-market resale price of full-power television broadcast licenses.[14] This ATV fee could be added to the fees collected for A&S services, as the broadcasters have suggested in their initial Comments.[15]

We are gratified that broadcasters are willing to pay "comparable" fees for use of the "transition" spectrum for A&S services.[16] However, we continue to support the idea of an auction as a more appropriate means to raise revenue, one which will more closely approximate the current market value of the

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> and shall seek to promote the purposes specified in section 1 of this Act and the following objectives:
> ...
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource ...

47 U.S.C. Sec.309(j)(3)(C) (emphasis added).

[14]E.g., the Commission could examine the past 20 station transfers, dividing the sale price for each transfer by the population of the station's service area to determine the "per-viewer" price of that sale, then derive an average of the 20 transfers. Such a benchmark could be adjusted regionally or on a case-by-case basis.

[15]Broadcasters' Comments at 23.

[16]Id.

spectrum. Bidders will be able to factor in risk, current economic conditions and projections, inflation expectations, their own long-term business plans, etc. when they make their bids. In the alternative, the Alliance endorses the proposal that broadcasters pay fees at least equal to those paid by other wireless data transmission providers. To the extent that similar services also receive free spectrum, broadcasters should be required to pay for the most analogous service which does, in fact, pay market rates for spectrum.

Broadcasters posit substantial procedural difficulties in implementing alternative fee structures, including paperwork requirements and even the use of electronic devices.[17] These "proposals" are merely straw men put forward to "illustrate" the difficulty of imposing any fee structure whatsoever. There are simpler ways to determine market-based fees for the ATV license which meet all the broadcasters' requirements for simplicity and confidentiality.

II. "PUBLIC INTEREST" PROGRAMMING MUST DEMONSTRABLY CONTRIBUTE TO THE COMMISSION'S PUBLIC INTEREST GOALS.

The broadcast industry's reading of "the public interest" seems to assume that the industry's mere existence in the commercial marketplace, and its distribution of commercial programming for profit, is the sum and substance of the public good.[18] The Commission should not support this definition. The

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[17]Broadcasters' Comments at 23.

[18]Broadcasters' Comments at 8.

Alliance recognizes that commercial broadcasting is not a charitable institution; broadcasters' interests are guided, as they should be, by profit maximization. But the public interest goes beyond creating wealth for shareholders. Broadcasters' public-interest responsibilities should not be deemed fulfilled by their profit-making activities.

While the broadcasters may "view their civic role as central to their business,"[19] their actions instead suggest that their business is central to their civic role. The broadcasters argue that their news programming evidences their public interest commitment,[20] although news programs enjoy ratings comparable to those of prime-time entertainment shows.[21] News divisions of television stations and networks are ratings-driven and are expected to turn a profit.[22] The decline of responsible broadcast journalism has reached the point that Don Hewitt, executive producer of CBS' "60 Minutes," has called for a three-year moratorium on news as profit centers for network television, stating that "As long as the three networks' [news divisions] are all involved in being profit centers, you aren't going to see any

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[19]Broadcasters' Comments at 9.

[20]Id.

[21]See, e.g. Electronic Media, Dec. 11, 1995, at 52-55.

[22]See, e.g., Robert Walters, "Will TV News Bit its Corporate Hand?", Los Angeles Times, August 8, 1995, B9 (networks expect profitability from news programming); Bill Carter, "'Dateline NBC' Stands Tall in Ratings," New York Times, April 3, 1995, D8 ('Dateline' estimated to have made $50 million in profit for NBC in previous year).

improvement [in the quality of broadcast journalism]."[23] Broadcasters' news programming by itself does not satisfy the Commission's requirement that broadcasters serve the public interest.

"Profit maximization" may be but one "public interest" goal. Others may include: improving the education of our children to meet the economic challenges of the 21st century; creating an informed, active and involved electorate; providing ample opportunities for personal and political expression; and encouraging communication between the kaleidoscopically diverse opinions, views, religions, races, ethnic groups, lifestyles and personal circumstances that comprise the American melting pot. It is not enough for broadcasters to express abstract support for these goals; they need to take concrete steps to achieve them.

Nonetheless, broadcasters have fought the imposition of measurable public interest standards tooth and nail.[24] They have, for example, consistently failed to provide political candidates with regular free air time on a voluntary, viewpoint-neutral basis.[25] The refusal to provide a free venue for serious discussion of political issues has had a negative impact on the quality of political discourse. It has reduced American

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[23]Elliott Krieger, "Clinton Aide Comes Down Hard on Press," Providence Journal-Bulletin, March 2, 1995, 1A; see also Edwin Diamond, The Tin Kazoo: Television, Politics and the News at (87-109)(1975)(comparing local station news revenues to content).

[24]See, e.g., Paul Fahri, "The Battle Over Kids' TV," Washington Post, October 31, 1995, D1.

[25]See, e.g. S.Rep. 92-96, 92nd Cong., 2nd Sess. (to accompany S.382) at 1972 U.S.S.C.A.N. 1773 at 1777, 1806, 1854-55 (1972)(statement of broadcasting industry representatives that repeal of "equal opportunities" provision of 47 U.S.C. Sec. 315 would be quid quo pro for provision of free air time for political candidates).

political dialogue to thirty-second spots, and has forced many potential candidates out of the political arena altogether.

Consequently, broadcasters' concern about "additional" public interest obligations begs the question of whether the broadcasters have contributed to the public interest in the first place. Broadcasters can and should do more, as the Alliance outlined in its initial comments. If the broadcasters insist on making a colorable claim to serving the public interest, a clear, quantifiable and accountable commitment to political, cultural, educational and public access programming is required.

III. THE BROADCASTERS HAVE IMPLICITLY ADMITTED THAT ASHBACKER APPLIES TO THE ISSUANCE OF ATV LICENSES; ATV LICENSE ELIGIBILITY CANNOT BE LIMITED TO INCUMBENTS.

The Commission has asserted that the broadcasters may avoid Ashbacker hearings for their "transition" licenses, because the proposed action represents a simple "reallocation" of spectrum, rather than a new service.[26] However, the broadcasters have made an admission against interest in their haste to "sell" ATV to the Commission, Congress, and the public. They state that "flexible use of the ATV channel [will] allow broadcasters 'to serve the public with new and innovative services.'"[27] It follows a fortiori that "new and innovative services" cannot be "the same service" for Ashbacker purposes; the use of the plural must mean that at least one broadcaster plans to offer at least

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[26]Fourth Notice at Par. 28.

[27]Broadcasters' Comments at 18.

one service that is different than free, over-the-air commercial television broadcast. If the broadcasters say they are offering new services, then they are offering new services.

In our initial comments, the Alliance argued that limiting ATV license eligibility to incumbents would probably not withstand judicial scrutiny.[28] In light of the broadcasters' "admission against interest," acceptance by the Commission of an incumbency limitation would be "arbitrary and capricious."[29]

The "incumbents only" eligibility restriction is also unjustifiable on policy grounds. Broadcasters state that "ATV operators will have to contend with a host of ongoing complexities relating to NTSC channels, including adjacent and co-channel interference, new NTSC to ATV or ATV to NTSC interference, tower siting, equipment purchases, and programming development and procurement."[30] These issues face new entrants and incumbents alike. Ironically, broadcasters emphasize their lack of experience and ability when they ask for flexible implementation periods.[31] The broadcasters should not have it both ways. Knowledge of digital broadcast engineering does not reside solely with incumbent broadcasters. They are in no better or worse

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[28]Alliance Comments at 22.

[29]5 U.S.C. Sec. 706(2)(C)(1988); See also Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 453 (D.C. Cir. 1991), on remand 983 F.2 275 (D.C. Cir. 1993)(reversed on other grounds) (Commission's deviation from Ashbacker requirements by pre-defining eligible class was arbitrary and capricious).

[30]Broadcasters' Comment at 7.

[31]"Stations will have to undertake this [digital conversion] effort even though few broadcast engineers are trained in the digital environment, and few engineering or construction companies can claim expertise in building a digital broadcast system." Broadcasters' Comment at 13.

position than many other potential market entrants to implement ATV successfully. The concerns of the Commission and the broadcasters could be satisfied by promulgating objective engineering standards, personnel qualifications, tower siting requirements, etc., that would have to be met before a license issued. There is no reason why new market entrants from other industries (such as cellular service providers, cable providers, phone companies, etc.) could not meet any objective standards the Commission may care to set.

IV. MINIMAL SIMULCAST REQUIREMENTS UNDERCUT THE ENTIRE RATIONALE FOR FREE "TRANSITION" SPECTRUM.

We persist in our view that the only reasonable rationale for the scheme the broadcasters have proposed is to effect a transition to a programmatically identical free video service using digital technology. We understand that there may be some initial problems in converting current television programming for digital transmission, and do not object to broadcasting non-identical free, over-the-air ATV programming exclusively until such time as simulcasting is technically possible. Once it becomes possible to convert analog programming to simultaneous digital broadcast, broadcasters should be required to commit to transmitting the exact same content on their ATV signal as on their analog channel. Instead, the broadcasters have proposed transmitting a minimum (read "maximum") of 5 hours per week of free video programming on their digital channel.[32] This

[32]Broadcasters' Comment at 18.

represents less than five percent of a hypothetical 126-hour broadcast week. The remainder of each week would be likely to be used for lucrative A&S services.

Broadcasters wish to keep the minimum simulcast content unregulated, claiming that their expertise will "ensure that the primary use of the ATV channel"[33] will be free over-the-air video programming. If that is the case, then there is no reason for them to object to a quantitative standard which defines that "primary use." Like the Media Access Project, we believe that 75 percent is an appropriate and reasonable proportion.[34]

Comments by the Association of Independent Television Stations, Inc. ("INTV") recommending that the Commission award ATV licenses without any meaningful simulcast regulation are disingenuous. INTV states both that simulcast regulation is unnecessary because compliance is assured, and that regulation is unnecessary because independent television stations must have the flexibility to be in noncompliance when expedient.[35] If broadcasters want transition spectrum, they must be required to make a full transition, not create a situation in which broadcasters will attempt to stake a permanent claim to 12 Mhz of spectrum.

V. INCUMBENT BROADCASTERS SHOULD ONLY RECEIVE ONE MUST-CARRY CHANNEL.

The Alliance continues to be concerned that the addition of

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[33]Broadcasters' Comment at 22.

[34]MAP Comments at 17.

[35]INTV Comments at 12-13.

programmatically redundant "must-carry" channels will occur at the expense of PEG access capacity, as cable operators attempt to find space to carry these additional channels without eliminating their other commercial offerings. The Alliance also reiterates its concern that resolution of must-carry issues should wait pending the opinion of the Supreme Court in the appeal of the District Court's December 12, 1995 decision following the remand of Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445 (1994).[36] Resolution of this case will settle issues surrounding the constitutionality of the "must-carry" statute.[37] Consequently, any action by the Commission before the outcome of Turner is premature.

We continue to remain concerned that broadcasters' need for additional must-carry capacity does not comport with their stated goal of making a mere transfer of spectrum. The cable industry is in the process of developing commercially available digital cable up-converters and down-converters, and is already deploying fiber optic and hybrid fiber-coaxial cable. The cable industry, in fact, is in the midst of making a transition to digital similar to the one broadcasters contemplate.[38] Shortly, cable subscribers should be able to down-convert a digital cable transmission to be viewed on an analog television; and later, to upconvert an analog cable transmission to be viewed on a digital television. Must-carry, if deemed to apply to ATV transmissions

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[36]Turner Broadcasting Systems, Inc. v. FCC, U.S. Supreme Court Dk. No. 95-992 (1995).

[37]47 U.S.C. Sec. 522.

[38]See, e.g., Leslie Ellis, "Engineers will Detail State of Technology," 18 Multichannel News at 33 (January 8, 1996).

as well as analog, would require cable operators to carry two stations with identical programming -- one analog, one digital. Cable subscribers' possession of an analog/digital converter box would make the nature of each feed irrelevant. Because 66 percent of the television programming market is served by cable, the conversion to digital television is much more likely to be driven by the cable industry's switchover to digital transmission than by the broadcast industry's switchover.

The Alliance supports the National Cable Television Association's ("NCTA") view that broadcasters have intentionally misread Section 614(b)(4)(B) of the 1984 Cable Act,[39] when they claim that this section requires cable operators to carry multiple broadcast channels.[40] Section 614(b)(4)(B) requires broadcasters and cable operators to renegotiate must-carry and retransmission consent agreements upon reconfiguration of broadcast signals. The language of the statute clearly refers to change in technical standards, not a change in amount of overall carriage. The law does not contemplate a situation in which the number of broadcast stations is quintupled. Broadcasters should not be given another channel to transmit redundant programming.

VI. CONCLUSION -- THE COMMISSION SHOULD EXAMINE THE JAPANESE EXPERIENCE WITH HDTV.

We are mystified by (and skeptical of) the broadcasters' claim of ignorance regarding consumer demand for digital

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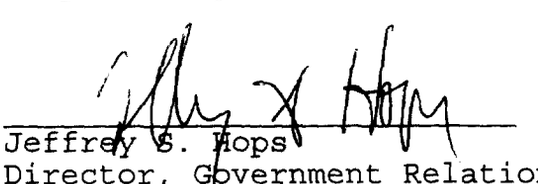
[39]47 U.S.C. Sec. 534(b)(4)(B).

[40]Broadcasters' Comments at 32; NCTA comments at 6.

television, when HDTV has been offered in the Japanese market for almost five years. This period has produced no significant HDTV demand.[41] There is no reason to repeat the Japanese mistake, except as a pretext for offering multiple standard definition television ("SDTV") and A&S services which may be technically inferior but more lucrative . If the industry is intent on making a transition to digital transmission of free, over-the-air video programming, it should be granted transition licenses for that purpose and no other.

The Alliance has no objection to broadcasters entering other lines of business if they desire, but they should do so on a level playing field. The Commission should offer A&S licenses on the open market, and invite the broadcasters to bid from the same position as all other entrants. The revenues thus collected should be used to support the public good -- public access, education, cultural programming, distance learning, and political participation. These are uses that will promote the interests that Americans share in creating an educated, culturally literate, politically aware, tolerant and intellectually robust society.

Respectfully Submitted,



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[41]Alliance Comments at 8-10.